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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE GERMAN ZAVALA, Defendant and Appellant.	E032425 (Super.Ct.No. PEF 004541) O P I N I O N

APPEAL from the Superior Court of Riverside County. Russell F. Schooling, Judge. (Retired judge of the Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Steven T. Oetting, Supervising Deputy Attorney General, and Stacy A. Tyler, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant was charged in a one-count information with second degree robbery (Pen. Code, § 211), and with personally using a firearm in the commission of the robbery (Pen. Code, §§ 12022.53, subd. (b) & 1192.7, subd. (c)). A jury found defendant guilty of the robbery and found the personal use allegation true. Defendant was sentenced to 13 years in prison.[1] He was ordered to pay $8,362 in restitution to the robbery victim. The additional sum of $13,638 was ordered held in trust for possible restitution to the victim of an uncharged robbery.[2]

Defendant appeals. First, he contends that the trial court erroneously allowed the prosecutor to impeach him with statements he made to investigating officers while he was in custody and *after* he invoked his right to counsel. Second, he contends that the trial court abused its discretion under Evidence Code section 352[3] in admitting a photograph of him with a gun in his waistband. Third, he contends that the trial court erred in ordering the sum of $13,638 to be held in trust for possible restitution to the victim of a prior uncharged robbery.

We affirm. We conclude that all of defendant's statements to the investigating officers were voluntary and were therefore properly admitted to impeach his testimony.

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[1] The sentence consisted of the middle term of three years for the robbery, plus 10 years for the personal use enhancement.

[2] The total sum of $22,000 was found during a search of defendant's room.

[footnote continued on next page]

We further conclude that the trial court abused its discretion in admitting the photograph, but that the error was harmless. Lastly, we conclude that defendant may not challenge the order holding the $13,638 sum in trust, because he disclaimed any interest in the funds.

FACTS AND PROCEDURAL HISTORY

A. *The Prosecution's Case*

On April 17, 2000, at approximately 1:15 p.m., Lane Gudat (Gudat) was robbed at gunpoint in the parking lot of a Bank of America in Murrieta. Gudat was the manager of a nearby service station and had gone to the bank to make an $8,362 cash deposit. He was carrying the money in a United Parcel Service bag. The bills were in denominations of $100's, $50's, and $20's. He deposited cash at the bank on a regular daily basis.

As Gudat got out of his car, he noticed a black Toyota pull up behind him and box him into his parking space. The man got out of the Toyota and looked at Gudat. The man pointed a gun at Gudat's face and said, "Give it to me . . . or I'll kill you." Gudat gave the man the bag with the money, and the man fled in the Toyota. The Toyota was last observed in the right-hand lane near the northbound Interstate 215 on-ramp. Gudat went into the bank and the police were called.

At trial, Gudat testified that the robber was wearing a red shirt, a black or dark-colored jacket, and a black hat that was pulled over the top of his head. He had a dark

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[3] All further statutory references are to the Evidence Code unless otherwise indicated.

complexion, a thin mustache, and "[k]ind of round toward slanted eyes." He was 5 feet 4 inches to 5 feet 6 inches in height, weighed between 100 to 155 pounds, and spoke with a Spanish or Asian accent. His hat covered his eyes such that Gudat could see only his cheeks and the bottom of his nose.

Gudat identified defendant in court as the robber. Gudat further testified that at the preliminary hearing, he recognized defendant when he was sitting in the jury box with a group of other individuals. Before the preliminary hearing, Gudat identified defendant from a photographic lineup with "some qualification" because the robber's cap had covered his forehead.

Gudat also testified that the gun used in the robbery was a black old-style western revolver, with a long, three- to five-inch barrel. He said the Toyota was a Celica/Supra with tinted windows and gold pinstripes, and that it had a metallic pink object on the back where the license plate should have been. Before trial, the police showed Gudat a jacket and photographs of a gun and car. Gudat testified that each appeared to be the items used in the robbery.

Judy Lujan (Lujan) worked near the bank as a receptionist, and made deposits every morning at 9:00 a.m. She also did volunteer surveillance work for the Temecula police department. On April 11, 2000, six days before the robbery, she saw a man sitting in a black car in the bank's parking lot. She became suspicious, and wrote down the car's license plate number from the back of the car.

The next day, Lujan returned to the bank and saw the same man in the same car. She wrote the man's description on a piece of paper. She described him as a "Spanish man around 23 to 35 years old," and 5 feet 6 inches or 5 feet 7 inches in height. The next day, she told the bank manager what she had seen. She was at the bank on the morning of the robbery, but did not see the man or his car.

After the robbery, the police contacted Lujan, and she gave them the man's license plate number and description. At trial, Lujan identified defendant as the man she saw at the bank, and identified his vehicle from police photographs. She also recognized defendant at the preliminary hearing, when he was sitting in the jury box in plain clothes with a group of other individuals. She could not, however, identify the man she saw from a photographic lineup.

The police ran the license plate number that Lujan gave them through the California Law Enforcement Telecommunications System, and it came back as registered to defendant at a Garden Grove address. A photograph of defendant was obtained from the Department of Motor Vehicles. At the time of the robbery, defendant was renting a room at the same address. He lived alone, and the room had its own exterior door.

The police searched the room, and found numerous items identifying defendant as its occupant. These included several bills and envelopes addressed to defendant at the Garden Grove address, and bank checks in defendant's name at the same address. The police also found two photographs of defendant. One showed him wearing a dark leather jacket, and the other showed him standing in a wooded area or jungle, with an automatic,

silver-colored handgun in his belt. The items found in the room, including the photographs of defendant, were admitted into evidence as group exhibit 55.

The police also found items in the room that tied defendant to the robbery. These included a black leather jacket, two red shirts, and three hats. Under the bed, the police found a lockbox that contained $22,000 in cash, a four-inch .38-caliber revolver, and numerous identification cards and pay stubs in defendant's name. The cash was in denominations of $100's, $50's, and $20's.

Defendant was arrested on July 22, 2000, after the police searched his room. He was taken to the Garden Grove Police Department, where he was interrogated by Detective Ganley and Officer Carrillo of the Murrieta Police Department.

B. *The Interrogation*

The interrogation was videotaped and transcribed. The transcript is 94 pages in length. Before trial, the trial court ruled that defendant's statements on pages 8 through 80 of the transcript would be admissible in the prosecution's case-in-chief. It reasoned that pages 1 through 8 included statements taken before defendant was advised of his *Miranda* rights, and pages 80 through 94 included statements taken after defendant had clearly invoked his right to counsel.

The prosecution did not use any of defendant's statements in its case-in-chief. Defendant then testified in his own defense. After defendant testified, the trial court ruled that all of defendant's statements were voluntary and were admissible to impeach

him. None of defendant's statements after page 80 of the transcript were used to impeach him.

C. *The Defense Case*

Reynaldo Mejia (Mejia) first testified for the defense. He said that on April 17, 2000, the day of the robbery, he and defendant went to Escondido to look at cars. Mejia said that he and defendant left Mejia's house in Sylmar about 7:00 a.m. and returned at 4:30 p.m. Mejia said that defendant's Toyota was parked at Mejia's house during the entire day, and that they instead drove Mejia's Chevrolet Nova.

Defendant then testified that on April 12, five days before the robbery, he was in the parking lot of the Bank of America in Murrieta. He explained that his car broke down, and he called "Triple A" from inside the bank. He presented documentation from "Triple A" that he had received service that day.

Defendant also corroborated Mejia's alibi testimony. He said that on April 17, the day of the robbery, he and Mejia went to Escondido to buy a new car. He denied being in Murrieta on April 17, and denied robbing Gudat. He said that the lockbox, the $22,000, and the pistol did not belong to him. Instead, he said he was keeping the items for a man named Manuel Gonzalez Gutierrez.

D. *Defendant's Impeachment*

The prosecutor impeached defendant with some of the statements he had made to Detective Ganley and Officer Carrillo. Early during the cross-examination, defendant admitted that some of the things he told the officers were lies, and some were true.

Defendant also admitted he told the officers he had never owned a gun, and that he had never had or possessed a gun for any reason. He insisted that these statements were true. The prosecutor then showed defendant the photograph of a man standing in a wooded area or jungle, with a gun in his waistband, that had been admitted into evidence as part of group exhibit 55. Defendant admitted he was the man in the photograph, and that the object in his waistband was a gun. Neither the photograph nor the gun depicted in it were mentioned again during the course of the trial. The prosecutor did not refer to the photograph or the gun during closing argument.

Regarding the pistol found in the lockbox, defendant said he had cleaned the pistol but had never fired it. He admitted he lied to Detective Ganley when he told him that he had gone shooting with the pistol in Azusa.

DISCUSSION

A. *The Statements Used to Impeach Defendant Were Obtained in Violation of Miranda, But the Statements Were Voluntary and Were Therefore Properly Admitted to Impeach Defendant*

Defendant contends that the trial court erroneously allowed the prosecutor to use his statements to the investigating officers for impeachment purposes, because they were obtained in violation of *Miranda*[4] and were therefore *presumptively* involuntary. He further contends that his statements were involuntary under the traditional standard for evaluating voluntariness, because he had limited education and English skills.

We first address whether the statements that were used to impeach defendant were obtained in violation of *Miranda*. We conclude that they were. Nevertheless, we further conclude that the statements were voluntary under the totality of the circumstances, and were therefore properly admitted for impeachment purposes.

"The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution is protected in 'inherently coercive' circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel. [Citations.] 'If a suspect indicates "in any manner and at any stage of the process," prior to or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated. [Citation.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 992 (*Cunningham*).)

"A suspect, having invoked these rights, is not subject to further interrogation by the police until counsel has been made available to him or her, unless the suspect personally 'initiates further communication, exchanges, or conversations' with the authorities. [Citations.] If a suspect invokes these rights and the police, in the absence of any break in custody, initiate a meeting or conversation during which counsel is not present, the suspect's statements are presumed to have been made involuntarily and are inadmissible as substantive evidence at trial . . . ." (*Cunningham, supra,* 25 Cal.4th at pp. 992-993.)

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4 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

"The rule of *Edwards* [*v. Arizona* (1981) 451 U.S. 477 (*Edwards*)] 'applies only when the suspect "ha[s] expressed" his wish for the particular sort of lawyerly assistance that is the subject of *Miranda.* [Citation.] It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.' [Citations.] The suspect must unambiguously request counsel. [Citations.]" (*Cunningham, supra,* 25 Cal.4th at p. 993.)

If the suspect's request for counsel "fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. [Citation.]" (*Davis v. United States* (1994) 512 U.S. 452, 459.) "'[T]he interrogation must cease until an attorney is present *only* [i]f the individual states that he wants an attorney.'" (*Ibid*.) "If a suspect's request for counsel . . . is ambiguous, the police may 'continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1194.)

We apply federal standards in reviewing a defendant's claim that his statements were obtained in violation of *Miranda*. "We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." (*Cunningham, supra,* 25 Cal.4th at p. 992.)

Defendant contends that he invoked his right to counsel four times during the interrogation. He contends he made his first request at page 9 of the transcript, shortly

after he was advised of his *Miranda* rights. The following passages were spoken in Spanish by Officer Carrillo and defendant:

"CARRILLO: You have the right to an attorney before and during the interrogation now. [¶] . . . [¶]

"[DEFENDANT]: Now, right, an attorney? [¶] . . . [¶]

"CARRILLO: Hum hum. If you want an attorney, you can have one. If you can't pay for an attorney, one will be given to you before the interrogation if you want one. If you want an attorney we have to give you one. [¶] . . . [¶]

"[DEFENDANT]: Well, yes, but . . . what do I want an attorney for?

"CARRILLO: Okay. [¶] . . . [¶]

"[DEFENDANT]: I don't understand. But if you believe that it's necessary. [¶] . . . [¶]

"CARRILLO: No, I, I have to read these rights of the State of California to you.

"[DEFENDANT]: Oh, okay."

Defendant correctly notes that, at this point, the officers had not told him he was the primary suspect in a robbery. Rather, they only told him they wanted to speak to him about a robbery. Defendant argues that "[t]his confusion explains [his] equivocation." He contends his second request for an attorney followed shortly after his first, at pages 10 and 11 of the transcript:

"CARRILLO: Okay, and I have to read it to you and you tell me if you want an attorney or not before you talk to me, right? [¶] . . . [¶]

"[DEFENDANT]: Yes, why? Is it something serious? Is it important? [¶] . . . [¶]

"CARRILLO: It's about, it's about a robbery. We need to talk. [¶] . . . [¶]

"[DEFENDANT]: Fine, then it's something important, yes. [¶] . . . [¶]

"CARRILLO: Okay, do you understand each of these rights that he has explained to you? [¶] . . . [¶]

"[DEFENDANT]: Yes, uh-huh. [¶] . . . [¶]

"CARRILLO: Okay. Do you want to talk with me then? Shall we talk about this? [¶] . . . [¶]

"[DEFENDANT]: Yes, of course.

"CARRILLO: Okay. [¶] . . . [¶]

"[DEFENDANT]: "But-

"CARRILLO: He understand his rights- [¶] . . . [¶]

"[DEFENDANT]: Excuse me? [¶] . . . [¶]

"CARRILLO: Yes. [¶] . . . [¶]

"[DEFENDANT]: *Just a moment. You say that it's something serious. I need an attorney. It's important.* [¶] . . . [¶]

"CARRILLO: Yes, what I'm saying is that the United States government[-]

"[DEFENDANT]: Hum hum. [¶] . . . [¶]

"CARRILLO: Has some rights that the police need to give a person before they ask him lots of questions." (Italics added.)

Shortly after these passages, the conversation continued at pages 12 and 13 of the transcript:

"CARRILLO: Yes, you want to speak with me about what I need to talk about with you without an attorney, you can talk without an attorney. If you want an attorney, we will find you one. It all depends on you, right? [¶] . . . [¶]

"[DEFENDANT]: Yes, because if it's something serious like that, we need someone to represent us, as individuals. [¶] . . . [¶]

"CARRILLO: Yes, hum hum. [¶] . . . [¶]

"[DEFENDANT]: Right, of course. [¶] . . . [¶]

"CARRILLO: So, you have, you can speak with me? [¶] . . . [¶]

"[DEFENDANT]: I can speak with you. [¶] . . . [¶]

"CARRILLO: Yes. [¶] . . . [¶]

"[DEFENDANT]: *But, but, if it's something serious having to do with the law, I will need an attorney.* [¶] . . . [¶]

"CARRILLO: Yes, so what do you want now? Then you want to speak with me or you don't want to speak with me? [¶] . . . [¶]

"[DEFENDANT]: Yes, of course, I want to speak with you, yes. Of course, aha.

"CARRILLO: He understands and he wants to talk to us for now.

"GANLEY: Okay." (Italics added.)

Defendant unequivocally invoked his right to an attorney at page 11 of the transcript when he said, "I need an attorney." The officers ignored this request, and

continued asking defendant whether he wanted to speak with them. Defendant finally relented, and proceeded to answer the officers' questions. After answering numerous questions, at page 80 of the transcript, defendant again said, "Now I need an attorney, because this is serious." Contrary to the trial court's ruling, however, this was not defendant's first unequivocal request for counsel.

Nevertheless, defendant's statements were properly admitted to impeach him. A statement obtained in violation of a defendant's Fifth Amendment right to counsel may be used for impeachment should the defendant take the stand. (*Harris v. New York* (1971) 401 U.S. 222, 224 (*Harris*).) The *Harris* rule applies even where a statement is taken in deliberate violation of *Edwards*, provided that "no actual coercion occurs." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1196, 1201-1202,[5] following *Oregon v. Hass* (1975) 420 U.S. 714, 722.) In the present case, there is no suggestion in the record that the statements used to impeach defendant were involuntary or coerced.

We independently review a trial court's determination of voluntariness. We do so, "'in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the [encounter]" . . . .' [Citations.]" (*Neal, supra,* 31 Cal.4th at p. 80.) "A statement is involuntary . . . when, among other

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[5] Our state Supreme Court has not decided whether the People may use a voluntary statement to impeach a defendant if the statement was intentionally obtained by a law enforcement officer, in deliberate violation of *Miranda*, pursuant to a "widespread" or "systematic" "policy" or "training" or "practice" to obtain such statements for the purpose of impeachment. (*People v. Neal* (2003) 31 Cal.4th 63, 78, fn. 4 (*Neal*).)

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circumstances, it 'was "'extracted by any sort of threats . . ., [or] obtained by any direct or implied promises, however slight . . . .'"' [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.'" (*Id*. at p. 79.)

The officers' violation of defendant's *Miranda* rights or, more particularly, *Edwards,* is also a factor that we must consider in determining the voluntariness of defendant's statements. (*Neal, supra,* 31 Cal.4th at pp. 81-82.) As defendant notes, statements obtained in violation of *Miranda* are presumptively involuntary. (*Cunningham, supra,* 25 Cal.4th at pp. 992-993.) It is also apparent from the videotape and transcript of the interrogation that defendant's English skills were limited. He is a native of El Salvador, and has a sixth grade education. And before the interview, the officers did not tell defendant that he was a suspect in a robbery.

Under the totality of the circumstances, however, we conclude that defendant's statements were voluntary. The interview was conducted in Spanish, defendant's first language, except to the extent defendant chose to speak English. The officers did not threaten defendant or engage in any acts of intimidation or coercion. There was no indication that defendant was deprived of food or sleep. In the videotape, defendant appeared to be comfortable and willing to answer the officers' questions. Defendant was 35 years old at the time of the interview, and neither youthful nor inexperienced.

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Defendant does not contend that this occurred here, and no evidence of such a policy, training or practice was presented below.

The present case stands in marked contrast to *Neal*. There, the defendant invoked his right to counsel nine times. An officer ignored all of defendant's requests, and continued to question him. The defendant was youthful, inexperienced, had minimal education, and was of low intelligence. The officer testified that he intentionally did not honor the defendant's invocation of the right to counsel. The officer called the defendant a liar. He told defendant that if the defendant did not cooperate the system would "stick it to him." The officer also told the defendant that by talking, he could help himself. Additionally, the defendant was in custody for over 24 hours without food or toilet facilities before making the inculpating statements. (*Neal, supra*, 31 Cal.4th at pp. 81-85.)

Accordingly, we conclude that defendant's statements to the officers were properly admitted for impeachment purposes.

B. *The Trial Court Abused Its Discretion in Admitting the Photograph of Defendant With a Gun in His Waistband, But the Error Was Harmless*

As noted, during a search of defendant's room, the police found a photograph showing defendant with a gun in his waistband. Defendant contends that the trial court abused its discretion under section 352 in admitting the photograph.

We agree that the trial court abused its discretion in admitting the photograph on the issue of defendant's control of the contents of the room and the lockbox. We further conclude, however, that the error was harmless beyond a reasonable doubt.[6]

The photograph was introduced during the prosecution's direct examination of Detective Ganley. The prosecutor asked Detective Ganley about the items found in defendant's room. Detective Ganley referred to the photograph as "[a]nother photograph of [defendant] standing in the woods." No reference was made to the gun depicted in the photograph.

Before cross-examining Detective Ganley, defense counsel moved to exclude the photograph under section 352. He argued there was no evidence that the gun in the photograph was the same gun that was used in the commission of the alleged robbery, and the photograph was unduly prejudicial because it depicted a gun. The prosecutor argued that the photograph was "further indicia of the defendant's ownership and occupancy of the room" where the police seized numerous items identifying defendant as the robber, including clothing and a lockbox that contained a .38-caliber revolver, ammunition, and $22,000 in cash.

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[6] Defendant further contends that the admission of the photograph violated his state and federal due process rights by rendering the trial fundamentally unfair. In the trial court, defendant did not object to the admission of the photograph on constitutional grounds, but only on statutory grounds. Accordingly, this issue is not cognizable on appeal. (*People v. Carpenter* (1997) 15 Cal.4th 312, 385.) Nevertheless, defendant suffered no prejudice, because the trial court's error was harmless beyond a reasonable doubt.

After performing an analysis under section 352, the trial court ruled that the photograph would be allowed into evidence, because it showed defendant's ownership and occupation of the room. The photograph was later admitted into evidence, together with many other items identifying defendant as in control of the contents of the room and lockbox.

The photograph was not mentioned again until defendant's cross-examination. Then, the prosecutor asked defendant whether he told Officer Carrillo that he had never owned or possessed a gun. Defendant agreed he had made that statement, and that it was true. The prosecutor then showed defendant the photograph. Defendant admitted he was the person in the photograph, and that the object in his waistband was a gun. He also said the photograph was taken in 1999, not 1998 as indicated on the photograph.

Under section 352, trial courts have discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (§ 352.)

"'Reasonable exercise of trial court discretion pursuant to . . . section 352 requires that the trial judge balance the probative value of the offered evidence against its potential of prejudice . . . . *That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion*. [Citation.]'" (*Hinson v. Clairemont Community Hospital* (1990) 218

Cal.App.3d 1110, 1123-1124, italics added, disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228, fn. 10.)

"'The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "'Rather, the statute uses the word [prejudice] in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

The trial court's exercise of discretion under section 352 will not be disturbed on appeal "absent a clear abuse [of discretion], i.e., unless the prejudicial effect of the evidence clearly outweighs its probative value." (*People v. Karis, supra,* 46 Cal.3d at p. 637.) "[R]eversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice." (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

As noted above, the trial court ruled that the photograph was admissible because it was probative on the issue of whether defendant controlled the room and its contents. This issue was of central importance to the prosecution's case, because the police found numerous items in the room that were linked to the robbery.

These included a leather jacket, shirts, and hats that matched Gudat's description of the robber's clothing. Under the bed, the police found a lockbox that contained a .38-caliber revolver, ammunition, and $22,000 in cash. The .38-caliber revolver matched Gudat's description of the robber's gun, and the cash was in the same denominations as the $8,362 in cash taken from Gudat.

While the relevance of the photograph to dominion and control is clear, the necessity of admitting the photograph was dubious. The police found many other items in the room that identified defendant as its occupant.[7] They also found many items in the lockbox that identified defendant as its owner.[8] Thus, the photograph was cumulative, and added very little on the issue of control.

The photograph was also prejudicial. Defendant was on trial for robbery with a personal use enhancement, and the photograph evoked an image of defendant as a person

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[7] The items found in the room included: (1) a Mead notebook bearing the name German Zavala; (2) an eight-page AT&T bill with the defendant's name and address; (3) an express company envelope with defendant's name and address; (4) a PacBell telephone record with defendant's name and address; (5) a purchase order bearing defendant's name; (6) an unopened Mobile gas station envelope with the defendant's name and address; (7) a note commemorating defendant's sale of a vehicle, and a Department of Motor Vehicles release of liability from defendant to the buyer; (8) bank books and checkbooks bearing defendant's name and address; and (9) a photograph of defendant wearing a leather jacket.

[8] In addition to the .38-caliber revolver, ammunition, and $22,000 in cash, the items found in the lockbox included: (1) a photograph of defendant in a tank top; (2) three employment authorization cards in defendant's name; (3) two California identification cards in defendant's name; (4) a bank card bearing defendant's name; (5) a jewelry store credit card in defendant's name; (6) a Mobile business card in defendant's name; and (7) 14 pay stubs in defendant's name.

who totes guns. Moreover, there was no showing that the gun in the photograph was the same gun used in the robbery. Instead, there was evidence that the .38-caliber revolver found in the lockbox was the gun used in the robbery, but there was no evidence that the .38-caliber revolver was the gun in the photograph.

"'When the prosecution relies . . . on a specific type of weapon, it is error to admit evidence that other weapons were found in [the defendant's] possession, for such evidence tends to show, not that [the defendant] committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]'" (*People v. Cox* (2003) 30 Cal.4th 916, 956.)

Thus, the photograph of defendant with a gun in his waistband had minimal probative value, and what little probative value it had was substantially outweighed by its undue prejudice. Accordingly, the trial court abused its discretion in admitting the photograph on the issue of control.

Nevertheless, the admission of the photograph on the issue of control did not result in a manifest miscarriage of justice. First, the photograph was admissible to impeach defendant's statement to Officer Carrillo that he had never owned nor possessed a gun. Second, the evidence of defendant's guilt was overwhelming, notwithstanding the admission of the photograph on the issue of control.

Gudat identified defendant as the robber, and Lujan identified him as the man she saw at the bank several days before the robbery. The license plate number Lujan wrote down matched defendant's vehicle. Gudat and Lujan both identified defendant's vehicle.

Gudat identified defendant's clothing and the .38-caliber revolver from police photographs. The $22,000 in cash found in the lockbox was in the same denominations as the $8,632 sum taken from Gudat.

Thus, it is not reasonably probable that a result more favorable to defendant would have been reached had the photograph not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Indeed, in view of the overwhelming evidence of defendant's guilt, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Defendant argues that, had the jurors not seen the photograph, they might have believed his testimony that the .38-caliber revolver and $22,000 in cash found in the lockbox belonged to someone else. We disagree. As noted, there were numerous items in the room and in the lockbox that identified defendant as the robber. And under cross-examination, defendant admitted that many of his statements to the investigating officers were not true. His credibility was very thoroughly impeached.

C. *Defendant May Not Challenge the Trial Court's Order Placing $13,638 in Trust for the Victim of a Prior Uncharged Robbery, Because Defendant Disclaimed All Ownership Interest in the Funds*

Defendant contends that the trial court erred in placing $13,638 in trust for the victim of a prior uncharged robbery.[9] Defendant maintains that the trial court's order was "unsupported by any tangible evidence. Therefore, it deprived [him] of his due process rights, and violated the statutory law governing restitution fines."

The People contend that defendant lacks standing to challenge the trial court's order, because he disclaimed any interest in the subject funds. We conclude that defendant may not challenge the trial court's order, because he disclaimed any ownership interest in the $13,638 sum. Accordingly, we do not consider whether the trial court's order holding the funds in trust was authorized or adequately supported.

During trial, the defense sought to introduce evidence of the uncharged robbery. Its theory was that someone other than defendant robbed both Gudat and the victim of the prior robbery, James Cates (Cates). A police report indicated that the prior robbery occurred in the parking lot of a Temecula bank on November 29, 1999. The description of the suspect and vehicle used in the prior robbery matched Gudat's description of defendant and his vehicle. Both robberies also involved thefts of service station deposits, and both occurred on Mondays.

Cates arrived in court to testify at a section 402 hearing. Cates looked at defendant and said, "That's the person who robbed me." This occurred outside the jury's presence, and before Cates was called to the stand. The defense then decided not to introduce any evidence of the uncharged robbery.

In considering an unrelated posttrial motion, the trial court noted that "there is [a] certain indication that there has been not one but two armed robberies by this defendant. Granted, it didn't come out at trial, but the indications are pretty clear that he didn't get all that money in that strongbox from this robbery, and he didn't get it from working."

At sentencing, the trial court ordered that "restitution to the victim [in the instant case] in the amount of $8,362 shall be deducted from . . . the $22,000 found . . . . The balance thereof shall be held in trust for any restitution found to be due to the victim of the . . . prior robbery offense . . . . Any hearing thereon shall be conducted by the Court to be determined there."

Thus, the trial court did not order restitution to the victim of the uncharged robbery. Rather, it ordered that the $13,638 sum would be held in trust, pending a future restitution hearing, if any. Defense counsel waived his and defendant's presence at that hearing. Defense counsel also noted that defendant had signed a forfeiture disclaimer regarding the funds.

[footnote continued from previous page]

9 The $13,638 sum was the amount remaining of the $22,000 sum found in the lockbox, after the trial court ordered $8,362 of that sum paid to Gudat's employer as restitution for the charged robbery.

Defendant may not challenge the trial court's order regarding the funds, because he disclaimed any interest in the funds. A party who disclaims any interest in property is "estopped from asserting any right, title or interest in the property . . . ." (*Wechsler v. United States of America* (1976) 56 Cal.App.3d 574, 580; see also *Mono County Irr. Co. v. State* (1916) 32 Cal.App. 184, 188.)

The People note that defendant was never charged in connection with the 1999 robbery, and that the three-year limitations period of Penal Code section 801 expired on November 29, 1999. Therefore, the People argue that the funds ordered held in trust escheat to the state, because it is "found" property and no one has claimed it. In view of our conclusion that defendant may not challenge the order holding the funds in trust, we do not reach the People's further contention.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Ward
J.